IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 07.12.2007

Coram :

THE HONOURABLE MR.JUSTICE K.RAVIRAJA PANDIAN
and
THE HONOURABLE MRS.JUSTICE CHITRA VENKATARAMAN

Original Side Appeals Nos.256 and 257 of 2003

The Chief Engineer,
National Highways,
Madras 600 006. Appellant in both the appeals

v.

1. M/s.Gammons India Ltd., represented
by Power of Attorney Holder
Mr.Swapan Kumar Ghosh,
Gammon House,
Veek Savarkar Marg,
Prabha Devi, Bombay 400 025. ..1st Respondent in OSA.256/03

Gammons India Ltd.,
Gammon House,
Veek Savarkar Marg,
Prabha Devi, Bombay 400 025. ..1st Respondent in OSA.257/03

2. T.P.Ekambaram,
Sole Arbitrator,
Chief Engineer (Retired)
Highways, Rural Works,
Chepauk, Chennai 5. 2nd Respondents in both the appeals

Original Side Appeals under Order 36 Rule 1 of the Original Side Rules against the order of the learned single Judge dated 18.04.2001 passed in Appln.No.3583/01 and O.Ps. Nos.189 of 1995 and in O.P.No.184 of 1996.

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For the Appellant :Mr.R.Subbiah,
Special Government Pleader

For Respondents :Mr.R.Krishnasamy,
Senior Counsel, for
Mr.R.Venkataraman

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JUDGMENT

K. RAVIRAJA PANDIAN, J.

O.S.A No.256 of 2003 is filed against the order made in O.P. No.189 of 1995 and in application No.3583 of 2001. O.S.A. No.257 of 2003 is filed against the order made in O.P. No.184 of 1996. The appellant in both the appeals is the Chief Engineer of National Highways, Chennai. He assails the common order of the learned single Judge of this Court dated 18.04.2001 made in the above referred to Original Petitions whereby the learned single Judge dismissed the petition filed by the appellant, i.e., (O.P.No.184 of 1996) filed seeking for the relief of setting aside the award dated 30.01.1995 passed by the arbitrator and allowed the O.P. No.189 of 1995 which was filed by the first respondent herein seeking for the relief of passing a decree in terms of the award.

2. Mr.Subbiah, learned Special Government Pleader appearing for the appellant contended that though various claims under claims Nos.2, 5(b), 6 (A), (B), (C) and 9 (B) were put in issue before the learned single Judge, in these appeals, claim No.6 (A), (B), and (C) under which escalation sought for by the first respondent, granted by the arbitrator and confirmed by the learned single Judge is alone put in issue. He contended that though the period for completion of the work has already been over, at the instance of the first respondent herein, the appellant extended the time upto 30.09.1988 for completion of the work with the rider that the first respondent could claim escalation upto 20.04.1988 only. The said extension has been accepted by the first respondent without any demur or protest. Hence, the first respondent cannot claim escalation for the period subsequent to 20.04.1988. The extension granted by the appellant could be regarded as terms of the contract. If that be so, as per the terms of the contract, the appellant could claim escalation only upto 20.04.1988 and for the subsequent period the claim cannot be made and the escalation granted by the arbitrator for the subsequent period from 21.04.1988 to 30.09.1988 is beyond the scope of arbitration agreement and the grant of escalation by the arbitrator would amount to misconduct on his part in travelling beyond the agreement. He further contended that it is the discretion of the appellant that while granting the period of extension to restrict the right of the respondent to claim for escalation by fixing the period. Having accepted the extension of time with the restriction of period for claim of escalation upto 20.04.1988, the escalation claimed by the first respondent, granted by the arbitrator and affirmed by the learned single Judge has to be set aside.

3. On the contrary, Mr.Krishnasamy, learned senior counsel appearing for the first respondent contended that the terms of the contract provide for various clauses. The clause pertaining to Adjustment of price variation in materials P.O.L. and labour and wages provided that the operative period for this contract shall end on the last date of completion of period as per clause 1.2 of the tender document or with the last date of the valid period of time extension granted by the accepting authorities. The period of extension shall be considered in continuation of the original operative period. The said clause further provided for extension of time granted for any other

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reason whatsoever and other than those specified in the first respondent's letters dated 26.11.1982 and 21.02.1983, no adjustment in the contract price shall be made on account of variation in the price of materials, P.O.L., and labour wages. The letter dated 26.11.1982 referred to in the aforesaid clause was the letter of the first respondent, wherein under clause A-14 escalation was sought for. The relevant portion read as follows :

> Clause A.14 Escalation
>
> The formula evolved at All India level as suggested by the Ministry of Shipping & Transport (copy enclosed) is acceptable in this instance subject to the following modifications :
>
> 1. The operative date shall be the date of initial submission of tender.
> 2. The operative period shall be the time of completion of the work including extension(s) granted due to reasons beyond our control.

4. Thus, the appellant, having accepted in their agreement for adjustment of price variation by referring the letter of the first respondent dated 26.11.1982, now cannot wriggle out and contend that the escalation granted is not in accordance with the terms of the contract. The said contention is nothing, but misconstruction of the terms of contract. The arbitrator as well as the learned single Judge rightly rejected the contention which requires no interference of this Court.

5. The minimum facts of the case required to be stated for the disposal of the above appeals proceed as follows :

The first respondent and the appellant entered into an agreement dated 15.12.1984 in respect of completing the balance work of a high level bridge across Pamban Strait near Rameswaram island in in National Highways No.49 in Madurai-Dhanuskodi road for a total value of Rs.10,44,42,000/-. The period of completion of work originally fixed was for 36 calendar months, i.e., upto 28.02.1987 but the same was extended from time to time. The work was completed in all aspects and possession was handed over to the appellant on 30.09.1988. The respondent sought for certain claims which has been disputed by the appellant. Hence, the matter, as per the arbitration clause contained in the agreement, was referred to the arbitrator.

6. Before the arbitrator, the first respondent contractor claimed 14 claims. The arbitrator passed an award in respect of claims 2, 3, 5, 6 and rejected rest of the claims. In respect of the above said four items, the arbitrator awarded a sum of Rs.74,87,913/-. Aggrieved by the said award, as aforesaid, the appellant filed O.P. No.184 of 1996 for setting aside the award. The first respondent filed O.P. No.189 of 1995 to pass a decree in terms of the award. The learned single Judge considered the arguments of either parties with reference to each of the claims and sustained all the four claims and dismissed O.P. No.184 of 1996 filed for setting aside the award and allowed O.P. No.189 of 1995 thereby granting the decree in terms of the award.

7. Heard the learned counsel on either side and perused the materials available on record.

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8. As stated in the contention of the learned Special Government Pleader, the one and only issue disputed before this Court is award of claim No.6. Claim No.6 is with regard to payment due on account of (A) Escalation on the original contract value - Rs.68,26,916/- (B) escalation on extra items of work - Rs.4,28,666/- (C) Refund of deduction from work bills by way of forfeiture for delay in execution of work - Rs.1,00,000/-.

9. It is an admitted case of either side that though originally the period of completion of work was 36 calendar months upto 28.02.1987, the period of completion of the work was extended upto 30.09.1988. There is no dispute in it. However, the contention of the learned Government Pleader that though the period has been extended upto 30.09.1988, in the extension order dated 26.08.1988 itself it has been categorically stated that the respondent was granted claim of escalation only upto 20.04.1988. Hence, the claim made by the respondent for the subsequent period from 21.04.1988 to 30.08.1988 cannot be granted, as is against the terms of the agreement. The forfeiture of Rs.1,00,000/- from the bill amount for the belated completion of work is also in accordance with the terms of the contract. The order of the arbitrator directing refund of the amount is against the concluded contract.

10. As per the terms contained in the agreement, the operative period shall end on the last date of completion of the period, i.e., on 28.02.1987 or the last date of the valid period of time extension granted by the accepting authority. It is also provided that the period of extension shall be considered in continuation of the original operative period. So, the extended period shall be regarded as period fixed for completion of the work as per the original agreement. If that be so, the respondent contractor is entitled to claim the escalation till the expiry of the extended period. In addition to that the agreement provided that for the extension of time granted for any other reason whatsoever other than those provided in the Gammon India Limited letters No.P.-6139 E dated 26.11.1982 and Tm.G 228 dated 21.02.1983 no adjustment in the contract price shall be made on account of variation in the price of materials, P.O.L., and labour wages. Thus, for the reason stated in the first respondent's letter dated 26.11.1982, the appellant agreed for escalation. In the letter of the first respondent dated 26.11.1982 clause A-14 provided for escalation for the period of delay over which the respondent/contracted had no control. Then, the one and the only point to be considered is as to whether the extension of period of escalation sought for was reasons beyond the respondent-contractor.

11. The arbitrator recorded a finding that there was delay of two and half months in the approval of the designs by the Railway authorities for the railway span. As getting approval of the designs from Railway authorities could be done only by the appellant, the delay on account of this reason could not be put against the first respondent contractor as he had no control over getting the designs approved. Thus holding, the arbitrator has come to the conclusion that the delay of 2 ½ months in obtaining the designs approved from the railway authorities was beyond the control of the first respondent/contractor and for that period he was entitled to escalation.

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12. The arbitrator, on the basis of the materials, was of the view that there was delay of three months due to replacement of bearings in span Nos.1 to 14. The replacement of the bearings was carried out by the third party agency. The respondent could repossess the area for the purpose of construction work only after the completion of the work of replacement of bearings 1 to 14. In that process, there was a delay of three months. This delay could not be attributable to the respondent contractor and could only be regarded as 'beyond his control', which has been accepted for escalation under the terms of the agreement. Thus, the respondent was entitled to have 5½ months (2½ and 3) for the purpose of claiming escalation. On that basis the claim made by the first respondent was granted.

13. The learned single Judge, in his order in paragraph 12, has summarized that for a period of five months and ten days, the appellant has refused escalation cost. The appellant has also imposed a fine of Rs.1,00,000/- for not finishing the work within the time frame as per the terms of the contract. The learned single Judge has concurred with the reasoning of the arbitrator as he was also of the view that the delay of 5½ months was beyond the control of the respondent and as per the terms of the agreement the contractor was entitled to escalation for that period.

14. The contention of the learned Special Government Pleader that the extension granted upto 30.09.1988 with the restricting the first respondent's claim for escalation upto 20.04.1988 could be treated as terms of the contract and as such, the claim for the subsequent period cannot be made, in our view, has to be rejected in view of the adjustment of price variation clause contained in the agreement which is, already referred above, to the effect that the extension period would tantamount to be the end of the operative period and the escalation could be granted for the delay caused by the reason beyond the control of the contractor.

15. Having regard to the terms of the agreement, which provides for extension of time and also escalation till the extended period by regarding the extended period as the original contract period, the contention of the learned Special Government Pleader as to the restriction of the escalation period upto 20.04.1988 by the unilateral letter, cannot prevail over the terms of the agreement and thus cannot be a reason to non suit the respondent-claimant for claiming the escalation charges. The learned Special Government Pleader cited the decision of the Supreme Court in the case of Food Corporation of India v. Chandu Construction, (2007) 4 MLJ 73 (SC) to contend that the Court can set aside the award of the arbitrator if the award was contrary to the unambiguous terms of the contract or where the clear stipulation in the contract are ignored or if the arbitrator misdirected or misconducted himself. The facts narrated above speak for themselves. The unambiguous terms of the contract in respect of the adjustment of price variation in material P.O.L., and labour wages with which reference has been made in this judgment on more than two occasions, the respondent contractor is entitled to escalation till the extended

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period. When such unambiguous terms are available in the contract, the judgment rather strengthens the case of the respondent only and it does not advance the case of the appellant in any way.

16. In the absence of any contention that the arbitrator has misdirected himself or misconducted himself or misconducted the proceedings, the Court cannot set aside the award of the arbitrator invoking sections 30 or 30(a) of the Arbitration Act of 1940. The jurisdiction of the Court under section 30 of the 1940 Act to set aside the award was limited to the grounds stated in the section vide Union of India v. Jain Associates, (1994) 4 SCC 665. The learned Special Government Pleader tried to persuade the Court by repeating the argument that the arbitrator ignored the specific terms of the letter of extending the period of completion upto 30.09.1988, which would amount to travelling beyond the terms of the contract. We have already rejected the contention by giving reasons with reference to the adjustment of price variation clause. It is also trite to say that when there is an express term in the agreement, the Court cannot find on construction of the contract an implied term inconsistent with such express terms. On the basis of the adjustment of price variation clause the contention of the learned Special Government Pleader to regard the letter restricting the escalation dated 20.04.1988 as implied terms of the contract cannot be accepted.

17. For the reasons stated above, the appeals are dismissed. No costs.

mf

Sd/-
Asst.Registrar

/true copy/

Sub Asst.Registrar

To,

1. The Sub Asst.Registrar,
   Original Side, High Court, Madras.

2. T.P.Ekambaram,
   Sole Arbitrator,
   Chief Engineer (Retired)
   Highways, Rural Works,
   Chepauk, Chennai 5.

+4 ccs to M/s.R.Venkataraman, Advocate
Sr.Nos.72343(2 copies)& 72344(2 copies)

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